

## Juridical Review Of Agreement And Adoption Law Due For Adopted Children When Adopted Parent Lift Divorce

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**Abstract.** Kids are important in human life, a lot of people who are expecting the presence of children as successor descent but some have not given credence to be given the baby. Adoption is an alternative to get around this problem. One polemics are legal consequences for adopted children when the father of the foster mother divorced. This study aims to determine *hadhanah* for adopted children when the father of the foster mother divorced. This research using normative juridical approach, ie an approach based on the decision of the Supreme Court, law and jurisprudence. The results show that the Islamic Law Compilation (KHI) stated position adopted child the same as biological children they both get *Hadhanah*, except in the case of nasab so do not get the inheritance, but was borrowed for adopted children as contained only one-third. In the case of child maintenance rights for the adopted child under age, the rights given to a foster mother, if an adult or child is old enough lift may choose to want to go with whom, nevertheless all maintenance fees charged to the adopted child's adoptive father. Custody and all the costs of the foster child needs to last until the adopted child an adult, independent or have been married. If the adopted child if the woman he would marry then it could be a guardian of marriage are biological parents or biological relatives. So although the adoptive mother divorced fathers still be obliged to maintain and educate the adopted child.

**Keywords:** Judicial Review, Adoption, Legal Consequences, Divorce.

### 1. Introduction

Adoption is not a new thing in Indonesia because it is already very commonly done by the people of Indonesia. Just how and motivation that vary according to the different legal systems in the region concerned. Adoptions here is an alternative to save the marriage or to achieve domestic bliss even greater because of the purpose of marriage is for procreation is the child. So important is the presence of a child giving rise to various legal events, such as the lack of offspring / child, divorce, polygamy and adoption of the various legal events that occur for reasons within the marriage is not procreation (although this is not the only reason).

The family has an important role in the development of the nation and the State, as the smallest unit in the family community is a major cornerstone in the establishment of the nation and the State. Given the role that a family is very important for upright and sejahteranya society and the State, the State requires discipline and rules that will govern the family that emerges terms of family law which is defined as the overall provisions regarding the legal relationship concerned with familial incest and kinship by marriage, including the marriage, parental authority, guardianship, wardship, and the circumstances are not present.<sup>3</sup>

In addition to the important role of the family in the life of humans as social beings and is the smallest community groups within the wider community, consisting of

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<sup>3</sup> Ali Afandi 1986 *Hukum Waris Hukum Keluarga Hukum Pembuktian* Bina Aksara Jakarta p. 93

father, mother, and child. But not always these three elements are met, so that sometimes there is a family who do not have children or descendants. Offspring in a marriage can be derived from their own flesh and blood or biological children called legitimate son in Act No. 1 of 1974. The definition of a legitimate child contained in Article 42 states that a legitimate child is a child born in or as a result of a legal marriage. If in a marriage the couple does not have children, then they can also pass on offspring to be the tribe from extinction by raising children or so-called adoption. According to M. Budiarto adoption in Islamic law can be justified only if it meets the following provisions:

- Do not cut off the blood relationship between the adopted child and the biological parents and their families.
- Adopted children are not domiciled as heir of his foster parents, but remained as heir of his biological parents, adoptive parents likewise not located as heir of his adopted son.
- Adopted children should not use the name of his adoptive parents directly, but merely as the above address or identification.
- Adoptive parents do not act as a trustee in his adopted child marriages<sup>4</sup>,

In adoption made adoption agreement. Adoption agreement is a letter that was made by both parties ie between the biological parents and the adoptive parents. The letter is about the rights and obligations for both parties. With the letter of the agreement was legal and enforceable strong. So if there are problems in the future can be resolved legally applicable. Adoption agreement is vital that the biological parents could not take back her son who has been handed over to the adoptive parents.

Factually has been recognized that the adoption has been a part of people's habits in Indonesia and has penetrated into practice through the Institute of Religious Courts for the Islamic religion and the State Justice Institute for the non-Islamic religion. Terms of the child to be raised is listed in Government Regulation 54 of 2007.

However, in reality it is not uncommon also occurs a marriage in his home life raised the problems or issues that are difficult to overcome, resulting in conflict and climax occurred a rift between husband and wife which culminated in divorce, the severing of ties marital relationship and the cancellation of the laws of reason of an agreement. Despite the fact that divorce is permissible but divorce is a very hated by Allah.

For couples who already have children, even if the divorce can be completed properly and peacefully by her parents but still pose problems for their children. What about the foster child, who is not flesh and blood adoptive parents. When the adoptive parents divorced whether the child is getting its due or not. In Compilation of Islamic Law, a Presidential Instruction No. 1 of 1991 expressly stated that the adopted child is a child that is in terms of maintenance for everyday life, educational expenses and so shift the responsibility of the original or the biological parents to the adoptive parents by the decision of the Court.<sup>5</sup> How about when the adoptive parents divorced, whether the rights of adopted children remain the same as biological children were already clear rules.

*Hadhanah* is the right of a husband, wife and their children. Parenting and caring for the child is the duty of parents to children, carrying out childcare before and after

<sup>4</sup> M.budiarto 1985 *Pengangkatan Anak Ditinjau dari segi Hukum Akademika* Presindo Jakarta p. 24

<sup>5</sup> Article 171 letter (h)

divorce. However, its implementation is different, *hadhanah* the rights of children get the attention of both parents with affection.

Implementation *hadhanah* a mutual obligation, as husband and wife is a component (part integral) are equally important in the sense of humanity, to carry out the duties of domestic life, and therefore in the implementation of this task is no dominant (salient) and the rule (strength highest) between them, both in coaching families or the formation of the next generation. So it can be taken notion that education is the most important is the education of children in the hands of parents (father's mother), because the monitoring and treatment of the elderly to him as well, it will be able to regenerate the body and the intellect, cleanse his soul, and prepare for the future will come. Although the obligation to carry out the education of children is the responsibility of parents, but this implementation can switch to the other relatives. Is it something that is prevented, for example, the caregiver is not good at dealing with education, or caregiver rebellious people, or people who are eligible (father's mother) had died.

How important child care, in Act 4 of 1979, Article 2 (3) and (4) of the child welfare reads as follows: Children are entitled to care and protection both during in utero or after birth. Kids are entitled to protections against the natural growth and development. These two verses are clearly stated and encourage the need for the protection of children in order to promote the welfare of children and equitable treatment of the child<sup>6</sup>. Kids also have rights in addition to those where the rights are the responsibility of the parents, although in this case as a foster parent.

Given the importance of the protection of children, in order to guarantee the best conditions acceptable children in infancy and development, the government of Indonesia on 22 October 2002 has approved Act No. 23 of 2002 on the Protection of Children, and the importance of child care also (*hadhanah*) so she decided the marriage because of divorce will not eliminate child maintenance obligations, that is to say when the divorce both parents are obliged to carry out child maintenance<sup>7</sup>, What if the child's status as a foster child? Is still get *hadhanah* foster child before she is able to stand alone as defined in Islam and some of the Act. Who is entitled to make *hadhanah*, one of the adoptive parents are divorced or biological parents?

## **2. Results And Discussion**

### **2.1. The Implementation Agreement And Adoption Law Due For Adopted Children When Adopted Parent Lift Divorce**

Adoption is generally carried out or on the basis of an agreement between the prospective adoptive parents with biological parents of children who will be appointed. This agreement was made because the biological parents of the child was not able to educate and raise its economy and pay for the child, while the prospective adoptive parents are couples who have been married but have not been blessed with a baby, so finally decided to adopt a child.

Implementation of the agreement adoptions that occur generally starts from the delivery of the child to the biological parents of the prospective adoptive parents, both oral or written, then after the agreement between the two parties, made the submission letter witnessed by family and close neighbors.

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<sup>6</sup> Shanty Dellyana 1998 *Wanita dan Anak di Mata Hukum* Ed. 1 Liberty Yogyakarta p. 18

<sup>7</sup> Act No. 1 of 1974 on Marriage Article 41 (a).

Furthermore, to obtain authorization from the removal of the child, the adoptive parents filed a letter permohonan District Court for the religious non-Islam, while Muslim filed a petition to the Religious Court, as stated in Act No. 3 of 2006 on the Amendment of Act No. 7 of 1989 on the Religious Courts, Article 2, that the Religious Court is one of the institutions of judicial power for the people who are Muslims seeking justice regarding a particular case. Certain things here including adoption cases for the Moslems.

The significance of the Court Decision, both the General and Religious Courts is between a foster child with the adoptive parents of a relationship that gives the position of adoption for adopted children as a foster child is legitimate. In addition it also to further strengthen the position of the child with foster parents and will ensure legal certainty of removal of the child, while if it is not requested Court Decision, there will be problems later in life for their children, especially in terms of power biological parents and of the disinherited.

Adoption agreement is a letter stating adoptive parents tied the applicable legal rules. With the letter of the agreement, so if there are problems in the future can be resolved through legal channels. The letter agreement also confirms that, children who have been adopted can not be taken back by the party submitting the child to the adopter, except on his own volition adopters.

In a letter written therein adoption agreement that the adoption is done for the happiness of children, in addition to the license of the biological parents of the child or caregiver agency. If the document is complete it can be brought to the Department of Social Welfare.

How to make a good agreement and it is:

- The first thing that should be mentioned is the title letters, usually using the title of a child adoption agreement
- Below this will be a written statement, in the form of his name, date of birth, the wife's name, address and so forth, this is a statement of the biological parents
- Next will be mentioned bio person who will do the adoption. Usually, in which there is complete biodata with a specific reason
- Next fill in the letter shows that it is expected that children will get good guidance until he is able to live independently
- It is also stated therein that parents will not hold back a child who has been adopted
- And the last step is to write the date of birth, signature underneath another old man, also do not forget the written names of witnesses when the treaty is in progress. So if there are problems in the future it can be resolved.

## 2.2. Effects The Adoption Agreement When Adopted Parent Lift Divorced

As a result of the divorce that the problem is the problem of child maintenance (*hadhanah*). Fiqh Ulama agree that in the event of divorce, the mother is more entitled to parenting, while financing *sifanya* operational material on parenting is the duty and responsibility of the father<sup>8</sup>,

Childcare or *hadhanah* has ruled for the welfare of children. This shall also apply to adopted children as well as children's rights, because the transition of responsibility of the biological parents to the adoptive parents, the adopted children also get *hadhanah* that although the adoptive parents divorced, because basically adopted children were

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<sup>8</sup> M. Djamil Latif 1985 *Aneka Hukum Perceraian Di Indonesia* Ghalia Indonesia Jakarta p. 82

also the same as biological children in the right and obligations, except nasab or descent, inheritance, guardianship in marriage for girls.

Custody of a foster child who was under the age of adoptive parents after divorce, according to Article 105 Compilation of Islamic Law is the adoptive mother, this is no different with the biological child custody, unless the adoptive father also want care that the judge must decide by looking at the facts facts in the trial.

Article 105 Compilation of Islamic Law, in the event of divorce:

- Mumayyiz maintenance or child who is not yet 12 years old and his mother was right
- Mumayyiz childcare already handed over to the child to choose between father or mother as maintenance rights holders
- The maintenance cost is borne by his father

The above provisions, implicitly indicates that KHI and No. 3 In 2006 they are global, so have not given definitive solution juridical issues of childcare when her parents divorced. Unless the provisions of KHI Article 105 and Article 156 states that due to the broken marriage because divorce is:

- Children who are not yet eligible for *hadhanah* mumayyiz from the mother, unless the mother has died, his position is replaced by:
  - Women in a straight line to the top of the mom
  - Father
  - Women in a straight line to the top of the father
  - Sister of the child concerned
  - The women relatives by blood according to the side line of the mother
  - The women relatives by blood according to the side line of the father
- Children who already mumayyiz right to choose to get *hadhanah* of father or mother
- If it turns *hadhanah* holder can not guarantee the safety of children's physical and spiritual, even though the cost of living and *hadhanah* has been satisfied, then at the request of concerned relatives can move the Islamic Court *hadhanah* rights to other relatives who have the right *hadhanah* anyway.
- All fees and living *hadhanah* a dependent child's father according to his ability, at least until the child is an adult and can take care of themselves (21 years old)
- In the event of a dispute regarding *hadhanah* and living children, the Religious Court give its decision by letter (a), (b), (c), (d)
- The court may also keeping in mind the ability to father a set amount of fees for the maintenance and education of children who do not contribute to it.

From the above it can be concluded that Article 105 KHI determine parenting in two states;

- Children are not mumayyiz (not yet 12 years old)  
Nurturing the child is in the mother
- Children have mumayyiz (aged 12 years)

Handed over to the child to choose between father or mother to nurture

While Article 156 KHI arrange childcare when her birth mother died, by assigning custody to a family party in order. In addition, Article 156 letter c declare child custody may be void if the holder *hadhanah* can not guarantee the safety of children's physical and spiritual, which further *hadhanah* may assign rights to other relatives who have rights *hadhanah*, Act No. 3 of 2006 does not provide the setting means regarding childcare.

### **3. Closing**

#### **3.1. Conclusion**

So we can conclude the following things:

- In Compilation of Islamic Law stated that the position adopted child the same as biological children in *hadhanah*, except in the case of nasab so it does not get heir except was borrowed for adopted children as listed third course, so what happens to the adopted child the same as biological children according in the case of child custody.
- During the adopted child under age, then the foster parenting provided to the adoptive mother, if an adult or child is old enough lift may choose to want to go with whom, nevertheless all maintenance fees charged to the adopted child's adoptive father. Custody and all the costs of the foster child needs to last until the adopted child an adult, independent or have been married. If the adopted child if the woman he would marry then it could be a guardian of marriage are biological parents or biological relatives.
- In Islamic law, adoption does not bring legal consequences in terms of blood relationship, the relationship mewali guardian and heir inheritance relationship with the adoptive parents. Just got the same rights as biological children that custody (maintenance), child care is done for the welfare of the child. As for the maintenance of the child does not see the status of a biological child or an adopted child, but the implementation of providing welfare for children.

#### **Suggestions**

- Divorce is a last resort, but if there is no way other than divorce to solve a problem in the family, especially married couples not to make the child as a victim, then it is better
- In the event of divorce isolates children from contention arena becomes a necessity to prevent children from making the field of divorce and seizure
- Legislation against adopted children to be clarified and confirmed again, according to Islamic law adopted children so that the problems are not widespread.

### **4. References**

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- [2] Ali Afandi 1986 *Hukum Waris Hukum Keluarga Hukum Pembuktian* Bina Aksara Jakarta.
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- [4] M. Djamil Latif 1985 *Aneka Hukum Perceraian Di Indonesia* Ghalia Indonesia Jakarta.
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